

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

15 Cr. 643 (PKC)

5 GARY HIRST,

6 Defendant.

7 -----x
8 September 23, 2016
3:30 p.m.

9 Before:

HON. P. KEVIN CASTEL

10 District Judge

11
12 APPEARANCES

13 PREET BHARARA

14 United States Attorney for the
Southern District of New York

15 BY: BRIAN R. BLAIS

AIMEE HECTOR

16 REBECCA G. MERMELSTEIN

Assistant United States Attorneys

17 SHER TREMONTE LLP

18 Attorneys for Defendant

19 BY: MICHAEL TREMONTE

JUSTINE A. HARRIS

NOAM KORATI BIALE

20
21 ALSO PRESENT:

ELLIE SHEINWALD, Paralegal

1 (Trial resumed; jury not present)

2 THE COURT: I missed you all. Good to see you.

3 This is the charging conference in the United States
4 against Gary Hirst. All counsel and the defendant are present.

5 You should have draft number 3, and that's what I'm
6 going to work off of. Let me ask -- I'll turn to the
7 government first, and then I'll turn to the defense -- any
8 changes up to page 19?

9 MR. BLAIS: No, your Honor.

10 MS. HARRIS: Your Honor, as reflected in our letter,
11 we had asked that the phrase "the testimony of an" --

12 THE COURT: No, page.

13 MS. HARRIS: Page 11. I apologize.

14 THE COURT: Thank you. Go ahead. Now continue.

15 MS. HARRIS: Do you mind if I sit, your Honor?

16 THE COURT: No, sit. It's a better idea. Thank you.

17 MS. HARRIS: Thank you.

18 "The testimony of an accomplice may be enough in
19 itself for conviction if the jury believes the testimony
20 establishes guilt beyond a reasonable doubt."

21 Typically, obviously, that's a true state of the law,
22 but on the facts of this case, the two accomplice witnesses
23 really testified to collateral issues. They had incriminatory
24 information, obviously, that related to the case, but I don't
25 think, as matter of law, that either of their testimonies would

1 be sufficient to convict, and I think it would be misleading to
2 instruct the jury to that effect here.

3 THE COURT: Let me try this. "The testimony of an
4 accomplice may alone be enough to establish an element of a
5 crime if the jury believes that the testimony establishes that
6 element beyond a reasonable doubt."

7 Is that acceptable to the government?

8 MR. BLAIS: Yes, that's fine, your Honor.

9 THE COURT: Is that acceptable to the defense?

10 MS. HARRIS: If I could have a moment, your Honor.

11 (Pause)

12 MS. HARRIS: We're just trying to think briefly, your
13 Honor, because we're not even sure -- the two accomplice
14 witnesses in this case were Gavin Hamels, and he didn't testify
15 about anything about Mr. Hirst whatsoever except, I guess he
16 testified to on overt act.

17 MR. BLAIS: Your Honor, I guess our response to that
18 would be, Mr. Hamels' testimony alone could establish the
19 existence of a conspiracy even if he does not have direct
20 testimony about Mr. Hirst. So we do think his testimony alone
21 could establish that.

22 MS. HARRIS: That's fine, Judge.

23 THE COURT: After page 11?

24 MS. HARRIS: 13, your Honor. Page 13.

25 THE COURT: Yes. Up to 19. Up through 19. Yes. Go

1 ahead. 13.

2 MS. HARRIS: Page 13, the phrase "evidence of a prior
3 inconsistent statement is not to be considered by you as
4 affirmative evidence bearing of the defendant's guilt." We're
5 just not sure here -- I guess if a defendant testifies and
6 there's evidence of a prior inconsistent statement, that would
7 apply here.

8 THE COURT: Yes. Well, let me hear from the
9 government, because we also have a lot of emails in this case.
10 Is this instruction appropriate on this record? It's really
11 not impeachment of a witness with a prior inconsistent
12 statement of a witness.

13 MR. BLAIS: There certainly was impeachment through
14 prior inconsistent statements. If anything, I think this is
15 actually a helpful instruction for the defense.

16 THE COURT: That's what it's intended to be.

17 MS. HARRIS: On further consideration, your Honor, we
18 withdraw any objection.

19 THE COURT: All right. Go ahead.

20 MR. TREMONTE: Page 18.

21 THE COURT: All right.

22 MS. HARRIS: Page 18, I think on line 3. We thought
23 line 3, the reference to "government" there was not necessary.
24 I'm sorry. Mr. Tremonte?

25 MR. TREMONTE: Yes. It suggests that only the

1 government introduced emails. I'm just looking for the
2 specific reference.

3 THE COURT: Any objection to striking "the
4 government", or "government's", rather?

5 From the government?

6 MR. BLAIS: No, your Honor, because the defense did
7 use emails.

8 THE COURT: Great. So it's done.

9 MR. TREMONTE: Thank you.

10 THE COURT: Next. Anything through 19?

11 MS. HARRIS: No.

12 THE COURT: Okay, that's done. First 19 pages are
13 done. What's next?

14 MS. HARRIS: In terms of a line issue, our next page
15 is on page 26, your Honor, though I'm just trying to see where
16 the -- obviously we have issues --

17 THE COURT: Well, that's why we're doing this page by
18 page. You'll call it out when it comes up. Page 26 you have
19 an issue?

20 MS. HARRIS: Yes. We had asked that the Court admit
21 at the end of the page the phrase "as conclusively as with
22 direct proof, such as evidence of an express agreement."

23 THE COURT: One second.

24 MR. BIALE: It's the last --

25 THE COURT: So you would put a period after the word

1 "existed", and before the word "as", and strike everything
2 after the word "existed", is that the thought?

3 MR. TREMONTE: Yes, your Honor.

4 THE COURT: Any objection from the government?

5 MR. BLAIS: We do object to that, your Honor, because
6 the acts and conducts of other coconspirators can, in fact,
7 warrant an inference of the existence of a conspiracy just as
8 conclusively as with other direct proof, such as direct
9 evidence of an express agreement. So we think this is a
10 correct statement of the law.

11 THE COURT: Yes, it is a correct statement of the law.
12 The defense doesn't dispute that. It's a correct statement of
13 the law, correct?

14 MS. HARRIS: Your Honor, we are having pagination
15 issues because one of us has a black-lined version and the
16 other doesn't, so that's why I apologize.

17 THE COURT: All right. Do we have an extra copy of
18 the clean one?

19 MR. TREMONTE: Your Honor, we withdraw the objection.

20 THE COURT: Okay, that's gone. What's next? We're
21 kind of back to the future here using paper. Some of these
22 younger lawyers are not as familiar how this paper stuff works.

23 MR. BIALE: I'm good with the paper, your Honor.

24 Your Honor, we're up to page 34 --

25 THE COURT: Hang on now.

1 MR. BIALE: -- of the clean version.

2 THE COURT: Okay.

3 MR. BIALE: On this page, we just think that, as your
4 Honor has put in the third paragraph on "liability for acts and
5 declarations of coconspirators", the charge directly says that,
6 "the reasonable foreseeable acts or statements of any member of
7 the conspiracy are deemed under the law to be acts or
8 statements of all the members," and we would just ask in a few
9 places further down that "requirement of reasonable
10 foreseeability" be included.

11 So on the next page, 35, lines 2 to 3, that the
12 sentence that ends on line 3, we would propose adding, so it
13 would be, "have been a member of the same conspiracy may be
14 considered against the defendant so long as those acts or
15 statements were reasonably foreseeable to the defendant".

16 And then there's one additional place where we would
17 include similar language, which I can tell you where we have
18 it.

19 THE COURT: You don't have a clean version?

20 MS. HECTOR: We have the black-lined version.

21 THE COURT: I'll tell you what. We'll give you the
22 clean version. We're going to mark draft number 3 as the next
23 court exhibit. We'll do that on Monday. I believe it's going
24 to be Court Exhibit 7.

25 MS. MERMELSTEIN: Thank you.

1 THE COURT: This will make it easier.

2 MS. MERMELSTEIN: Thank you, your Honor.

3 MS. HARRIS: We had both, so we were confused
4 internally.

5 MR. BIALE: Your Honor, it appears you and I are the
6 only ones who used the clean version, and your clerk.

7 THE COURT: To be candid with you, we had a debate
8 about whether to send a black-lined issue, and I believe it's
9 appropriate to let people know what changes came in and not
10 make them hunt for it, so that's why we did it. But certainly,
11 we're working off the clean version. You now have it.

12 Now we're on page 35. So the suggestion is to add at
13 the end of the carryover sentence, the top of 35, that ends on
14 the third line "may be considered against the defendant so
15 long" -- go ahead.

16 MR. BIALE: "So long as those acts or statements were
17 reasonably foreseeable to the defendant."

18 THE COURT: Any objection from the government?

19 MR. BLAIS: Well, Judge, just looking at their letter,
20 I think they want to add this concept in four different places
21 in this --

22 THE COURT: I'm not adding it in four places. Is that
23 what the defense wants? Because then, really, I should on
24 every page add every concept. "Presumption of innocence"
25 should be on every page, "reasonable doubt" should be on every

1 page. It's not necessary. The jury is required to follow the
2 judge's instructions on the law.

3 It is my practice, just to let you know, to give the
4 jurors the typed text of the instructions. I will tell them if
5 there's any variance between what I say orally and the typed
6 text, it's the oral version that controls. They'll have that
7 with them in the jury room. If the plan here is to propose
8 four, it's not happening.

9 MR. BIALE: Your Honor, I think we'd be fine just
10 having it there in that one place I mentioned, then there's one
11 place later on in the charge.

12 THE COURT: Where?

13 MR. BIALE: In the wire fraud instruction where we
14 would want to have that again, because the same concept
15 applies, and I can tell you where that is.

16 THE COURT: All right. Without prejudice to the
17 government's ability to object to multiple placements, do you
18 have any objection on the top of 35?

19 MR. BLAIS: If there's that one single addition in
20 this particular instruction, no, we have no objection.

21 THE COURT: I'll hear you on whatever else.

22 MR. BLAIS: Fair enough.

23 THE COURT: Let's go. What next?

24 MR. BIALE: The second instance of that is on page 54.
25 Sorry, one second, your Honor. So just going page by page,

1 your Honor, there's a reference to "conscious avoidance".

2 THE COURT: So what are we doing? Page 54? Give me a
3 page number.

4 MR. BIALE: Let's do 54, your Honor.

5 THE COURT: Where?

6 MR. BIALE: So on page 54, at line 5, so we would add
7 after "all that is done thereafter, so long as those acts are
8 reasonably foreseeable to the defendant". Same concept.

9 THE COURT: Let's give everybody a chance to read
10 through here. I assume it would be "so long as those acts were
11 reasonably foreseeable to the defendant", correct?

12 MR. BIALE: Correct.

13 MR. BLAIS: Your Honor, this section is drafted in a
14 slightly different manner than the previous section. Here, the
15 instructions are talking about a member of the scheme being
16 legally responsible for something done in the past in
17 furtherance of the conspiracy, as well as for things that are
18 done thereafter, and I don't see how something in the past can
19 be reasonably foreseeable to somebody becoming a member of the
20 conspiracy. Obviously, foreseeability implies something
21 happening in the future. So I think it has a potential for
22 jury confusion.

23 THE COURT: I do tell the jury that, "the same
24 instructions on conspiracy that I gave you on Count One apply
25 to this count." Do I not? If I haven't, I should.

1 MR. BLAIS: I think you do, although this is actually
2 in connection with the substantive wire fraud instruction.

3 THE COURT: Well, then I don't know that it has any
4 place in there at all.

5 MR. BLAIS: Okay.

6 MR. BIALE: I think that makes sense to us, your
7 Honor. We'll withdraw it.

8 THE COURT: That's fine. We're back to page 35. What
9 do you have after 35?

10 MR. BIALE: We actually are still in the post page 54
11 world here.

12 THE COURT: Okay. So nothing until 54. At least 54.
13 Is that correct?

14 MR. BIALE: There is a reference to conscious
15 avoidance earlier.

16 THE COURT: What page?

17 MR. BIALE: Let me find it.

18 THE COURT: Court takes judicial notice that there is
19 no control F for paper.

20 MR. BIALE: It's at the bottom of page 43, your Honor.

21 THE COURT: And this may befuddle some lawyers.

22 Page 43?

23 MR. BIALE: Yes.

24 THE COURT: Let's see what we have. So nothing before
25 page 43. You're done up to this point, correct?

1 MR. BIALE: Yes, your Honor.

2 THE COURT: What's the proposed change on 43?

3 MR. BIALE: On 43, we don't believe that a conscious
4 avoidance charge is appropriate.

5 THE COURT: All right. Let me begin by having the
6 proponent of the charge argue why this should be, and then I'll
7 give you a chance to argue why this shouldn't.

8 Go ahead.

9 MR. BLAIS: Thank you, your Honor.

10 Your Honor, I think the case law is clear that when
11 there is a factual predicate for a conscious avoidance
12 instruction, that a conscious avoidance instruction should be
13 given, and I'll talk in a minute about the factual predicate
14 here, but I did want to, just to frame that discussion, just
15 articulate two principles of law.

16 The first is from United States versus Nektalov, and
17 that's 461 F.3d 309 with a pin site 316 at 2d Cir. 2006. That
18 case says, "Where the evidence can support both a finding of
19 actual knowledge and a finding of conscious avoidance, the
20 government may present conscious avoidance as an argument in
21 the alternative. And the second principle of law is from
22 United States versus Hopkins, which is 53 F.3d 533 with a pin
23 site at 542, and that's Second Circuit 1995, and that case
24 says, "Such an instruction is not inappropriate merely because
25 the government has primarily attempted to prove that the

1 defendant had actual knowledge while urging in the alternative
2 that, if the defendant lacked such knowledge, it was only
3 because he had studiously sought to avoid knowing what was
4 claimed."

5 So while it may be true in this case that we are
6 largely relying on the knowledge argument, so long as there is
7 a factual predicate that supports a conscious avoidance
8 instruction, the case law suggests that it is appropriate that
9 such an instruction be given. I do think there is a factual
10 predicate for a conscious avoidance instruction here. We set
11 forth some of those argument in the letter brief that we filed,
12 and I can articulate some of them here.

13 THE COURT: Why don't do you that.

14 MR. BLAIS: One is the fact that I think it's
15 established in the evidence that the 5,333,333 shares that were
16 issued to Mr. Shahini on May 27th, 2010 were the exact same
17 number of shares that were sent back to the company and
18 canceled by the company in connection with Mr. Manley's
19 termination. That all happened within a week of each other.
20 There's a May 26th letter from Mr. Hirst to Continental and a
21 June 1st letter from Mr. Hirst to Continental regarding the
22 Manley shares in which he asks that the cancellation of those
23 shares be backdated to May 27th.

24 So we certainly think, given the highly, highly
25 unlikely coincidence that the exercise of the warrant

1 calculation, which was set forth in some complexity, that that
2 would yield the exact same number of shares that were just
3 turned in by Mr. Manley is certainly one fact that should put
4 Mr. Hirst on notice that there may have been something amiss
5 about this particular transaction.

6 I think number two, the fact that on at least two
7 occasions, the chief financial officer of the company was
8 unaware of certain transactions. In June, when he first
9 learned of the Shahini consulting agreement, which was
10 purportedly entered into in January, and then again in
11 September when he indicates to Mr. Hirst that he's unaware of
12 the existence of the warrant agreement and the issuance of the
13 shares, those two facts, the fact that the CFO on at least two
14 occasions is unaware of significant transactions going on at
15 the company, again, there's an argument that Mr. Hirst should
16 have been on notice, given the CFO's lack of knowledge about
17 significant transactions, that something was amiss with respect
18 to the issuance of the shares.

19 So I think, on multiple grounds, there's a factual
20 predicate for a conscious avoidance instruction.

21 THE COURT: Let me hear from the defendant.

22 MS. HARRIS: Your Honor, we realize the Court may not
23 have had a chance to read this, but just to help speed things
24 up. For today, we had submitted a short letter and filed it on
25 ECF at 2:00 which sets out our objections to the conscious

1 avoidance charge, but a couple of brief responses to what the
2 government just proffered.

3 We don't dispute the law that the government can argue
4 in the alternative -- obviously they largely presented the case
5 of direct knowledge -- but here, there still has to be a
6 factual predicate for that alternative, it can't be just a
7 hypothetical possibility as a backup plan.

8 There are two things that I heard Mr. Blais argue was
9 a factual predicate here. One, the notion of this sort of --
10 the coincidence of the 5.33 somehow suggesting that something
11 was amiss. First of all, I don't think that the notion of a
12 generalized sort of something amiss is enough to be a
13 substitute for the knowledge of the conspiracy alleged in the
14 indictment. While it could be something that would be of
15 concern, I don't think it's the kind of red flag that gives
16 knowledge of what the government has charged as the conspiracy
17 here.

18 Also, it's not even a fact, really, in itself, it's a
19 coincidence, it's not a fact in the world that is screaming out
20 to someone like a red -- you know, that this is a point you
21 could say that Mr. Hirst deliberating ignored.

22 I forgot, the preliminary issue we wanted to raise
23 with conscious avoidance, your Honor, is not only -- regardless
24 of whether there was a fact in the world that they could point
25 to as a potential red flag or putting someone on notice,

1 there's actually no predicate here for a failure to inquire on
2 the part of Mr. Hirst. There's no evidence, no evidence in the
3 record of not asking questions. I mean, it's just the record
4 is blank on that. There's nothing in the trial about a failure
5 to inquire, to investigate, or a failure to ask questions,
6 which I think is part of the factual predicate that needs to be
7 established, not just the fact --

8 THE COURT: Well, the government's position is if he
9 asked questions, that he had knowledge.

10 MS. HARRIS: Exactly. Actually, here, where everyone
11 else --

12 THE COURT: But if you avoid asking the questions,
13 then you don't obtain the knowledge.

14 MS. HARRIS: But your Honor, here, everyone did ask --
15 the government's own witnesses testified that they asked
16 questions and didn't get the knowledge. So I don't think we
17 can assume that -- there is no factual predicate to assume that
18 if questions were asked, the knowledge would be given. In
19 fact, the collective understanding of the board of directors,
20 and everyone else, was that a certain fact -- you know, that
21 they were informed by Jason Galanis and accepted certain
22 answers to their questions, so there's no reason to presume
23 that -- if we assume that he hadn't asked, that if he had
24 asked, that he would have been given any answer that was
25 different.

1 The second issue is that the June/September kind of
2 time period that Mr. Blais talks about as providing additional
3 red flags. Your Honor, that's after -- first of all, even to
4 the extent those constitute red flags, that's after the central
5 conduct of when Mr. Hirst allegedly entered this conspiracy. I
6 mean, the allegation here is that he entered the conspiracy and
7 did something wrong and joined up with Jason Galanis and others
8 when he signed the warrant agreement and when he signed the
9 letter to Continental to issue the stock. That somehow those
10 series of transactions were complete and done as of May 27th,
11 that's the moment he joined the conspiracy, and it's his state
12 of mind at that time that the jury is going to have to be
13 considering. So to then put elements or facts from the record
14 that occurred after that date as somehow then bearing on --
15 that he should have -- it doesn't link up. It has no bearing
16 on his state of mind as of the date that he allegedly joined
17 the conspiracy.

18 MR. TREMONTE: May I have one moment, your Honor?

19 (Pause)

20 MR. TREMONTE: Judge, I'd be interested to hear from
21 the government how it is that the correspondence between these
22 two numbers is evidence that something's amiss on their theory
23 of the case. I mean, I just don't understand that. Like why
24 is that in and of itself an indication of anything other than a
25 correspondence between two numbers. And as I understand their

1 foreseeability theory, it would have been in Mr. Hirst's
2 interest for there to have as many shares as possible in the
3 quote/unquote public float. Why is the cancellation of the
4 exact same numbers consistent with a theory of amiss? It
5 doesn't make any sense.

6 THE COURT: Let me ask you. Is the defendant
7 otherwise finished with their argument?

8 MR. TREMONTE: We're checking, your Honor.

9 THE COURT: All right, good.

10 (Pause)

11 MS. HARRIS: Your Honor, I mean, look. There are
12 other factors in the record that concern the Court or the
13 government and we'll be happy to respond to those.

14 MR. TREMONTE: Yes, your Honor. We're all set.

15 THE COURT: I've considered the issue, and I've
16 considered the arguments of both sides. I presided at this
17 trial, and I heard the evidence, and the evidence of
18 defendant's knowledge is a case built largely, though not
19 entirely, on circumstantial evidence. I look at this in a much
20 more holistic manner, having sat here through the trial, and
21 much of the evidence that would support a finding of actual
22 knowledge suggests that the defendant had knowledge of facts,
23 the same facts which would have given him an awareness of a
24 high probability that a fact was so.

25 It seems to me that conscious avoidance is quite

1 appropriate in this case as an alternate theory, and it's quite
2 appropriate for the government to argue that there was actual
3 knowledge. But alternatively, these facts, if they don't
4 amount to actual knowledge, amount to conscious avoidance, and
5 therefore, I am giving a conscious avoidance charge.

6 MR. BIALE: I think there's one other issue, your
7 Honor, on page 60.

8 MR. BLAIS: Your Honor, just to finish the thought on
9 conscious avoidance. I think that occurs in two places.
10 Page 43, which we just flagged, and then separately there's a
11 conscious avoidance instruction, which I think we need to
12 eliminate the terms which is currently there, if applicable,
13 which is on page 62. The top of page 62.

14 THE COURT: Thank you.

15 Go ahead.

16 MR. BIALE: Your Honor, on page 60, just before
17 "willfully causing a crime".

18 THE COURT: Yes.

19 MR. BIALE: In that short paragraph, at the end of the
20 aiding and abetting charge, we would propose replacing "if he
21 did" with "if the government has proved beyond a reasonable
22 doubt that he did", and then replacing in the next sentence "if
23 he did not" with "if the government has not proved beyond a
24 reasonable doubt that he did".

25 THE COURT: Any objection from the government?

1 MR. BLAIS: No, your Honor.

2 THE COURT: I just want to make sure on the second
3 sentence I don't have a double negative. So let me read the
4 way I propose to give it on the second sentence. This is the
5 last sentence above "willfully causing a crime". "If the
6 government does not prove beyond a reasonable doubt that he
7 did, then the defendant is not an aider and abettor and is not
8 guilty as an aider and abettor of that offense".

9 MR. BIALE: Sounds right. Yes, your Honor.

10 THE COURT: Okay.

11 MR. BLAIS: No objection from the government.

12 MR. BIALE: Those are all the changes we have, and we
13 have two instructions that we propose adding.

14 THE COURT: Which are?

15 MR. BIALE: Which are an instruction on multiple
16 conspiracies, and then the instruction on Regulation S.

17 THE COURT: All right. Let me let the government
18 first catch up on any changes. I guess take it from page 20
19 on.

20 MR. BLAIS: We have no changes. We have reactions to
21 the two additional instructions that are proposed.

22 THE COURT: I understand.

23 MR. BLAIS: We have no additional proposals.

24 THE COURT: Take a look at the defendant's proposed
25 multiple conspiracy charge on page 2 of the letter today, and

1 put a bracket around the first sentence, and put a bracket
2 around the last sentence such that it would read, "Proof of
3 several separate conspiracies is not proof of a single overall
4 conspiracy. As I have instructed you, you must determine
5 whether the conspiracy charged in the indictment actually
6 existed. If you find that the government has not proven beyond
7 a reasonable doubt that the conspiracy charged in the
8 indictment existed, you must acquit Mr. Hirst of that
9 conspiracy."

10 I'll hear from both sides why that isn't a proper
11 charge just as I've read it. Any objection from the
12 government?

13 MR. BLAIS: May we have a minute, your Honor?

14 THE COURT: Sure.

15 (Pause)

16 MR. BLAIS: Judge, as a general matter, I think, to
17 the extent that the defense is going to argue the existence of
18 multiple conspiracies, I do think they are entitled to a
19 multiple conspiracy instruction. I think our preference would
20 be to just use the instruction that's in Sands for multiple
21 conspiracy, which is I think instruction 19-5.

22 THE COURT: What does it say?

23 MR. BLAIS: I don't have it at my fingertips. I think
24 it, in essence, is very similar to the instruction that you've
25 read.

1 THE COURT: Okay. So everybody put your thinking cap
2 on. There could be a problem with what I just proposed, but
3 tell me what it is, because I think that's a correct statement
4 of the law.

5 MR. BLAIS: Agreed, your Honor. I don't think the
6 portion that you've -- excluding the first and last sentence, I
7 think the portions that you read are a correct statement of the
8 law.

9 THE COURT: So you have no objection to that.

10 MR. BLAIS: We would have no objection.

11 THE COURT: Okay. Let me hear from the defendant.

12 MR. BIALE: Your Honor, I think we're fine with that,
13 too. I think that the last sentence is from Sand, we're just
14 checking right now.

15 THE COURT: It may be, but Judge Sand -- and I love
16 him -- is not presiding in this case. And if it came from Sand
17 and Siffert, I would respectfully say that I don't think it's
18 as clear as it can or should be. So with all deference to
19 Judge Sand and John Siffert -- who I also like very much -- I
20 would not be inclined to give that.

21 So where do you propose for me to put this? That's a
22 tossup question.

23 MR. BIALE: Your Honor, I think we propose to put it
24 at the end of the charge on the existence of the conspiracy
25 which starts on page 25 and ends on page 27.

1 MR. BLAIS: I guess our proposal would be, rather than
2 putting it at the very end, put it as the second to last
3 paragraph, because I think the last paragraph as it exists is
4 basically a summary of the charge that precedes, so it seems
5 better to end with that.

6 THE COURT: Where are you?

7 MS. MERMELSTEIN: 27, your Honor.

8 THE COURT: 27.

9 MS. MERMELSTEIN: Yes.

10 THE COURT: So above the paragraph beginning "so you
11 must first".

12 MR. BLAIS: That would be our proposal.

13 THE COURT: Any objection?

14 MR. BIALE: No objection, your Honor.

15 THE COURT: Let me hear you on whether I should charge
16 anything on Regulation S and what I should charge. Go ahead.

17 MR. TREMONTE: Your Honor, we didn't hear back from
18 the government on this. We sent it sort of the middle of
19 today, so we didn't get a chance to discuss it.

20 Based on my previous conversations with the
21 government, my understanding is that we're in general agreement
22 that a charge is appropriate. I had a conversation with
23 Mr. Blais following a sidebar, and this really is an attempt to
24 sort of capture the basics, plus it tracks the testimony that
25 Mr. Laby gave, except, candidly, your Honor, I believe at the

1 end of the final sentence, "shares issued or sold pursuant to
2 Regulation S may be held in U.S.-based brokerage account", that
3 is Professor Laby, and may serve as collateral for a margin
4 load in a U.S.-based brokerage account," I don't think that's
5 controversial, but that's not from Professor Laby.

6 MR. BLAIS: Judge, I think the instruction as written
7 is not an incorrect statement of the law. I think this is what
8 Regulation S says and provides, however, we think it's
9 potentially confusing to give this instruction to the jury.
10 There is testimony in the record about Regulation S and how it
11 operates, and I think including this as a legal instruction may
12 carry some suggestion that the jury has to determine whether
13 Regulation S was or was not complied with in connection with
14 this case, and that's not something that they necessarily need
15 to find.

16 Now, of course, whether regulation was or was not
17 complied with may be evidence of intent in this case or
18 relevant in some other way, but I think just including a
19 standalone instruction on Regulation S may cause jury confusion
20 so I think our thought is we should leave it out.

21 THE COURT: I understand what you're saying, and I
22 have some ideas on what I might do.

23 MR. TREMONTE: Your Honor, if I could?

24 THE COURT: Go ahead, Mr. Tremonte.

25 MR. TREMONTE: If I could make a record on that, your

1 Honor. The big problem here, of course, is that there was
2 conflicting testimony from people who should have known better,
3 and we tried to clean that up to some extent on cross, but
4 unfortunately, at least one of the government's witnesses, if
5 not sort of one and a half, persisted in articulating not a
6 misunderstanding of Regulation S, but an understanding that is
7 basically flatly contradictory to what the law states. I think
8 that gives rise to a very serious problem in terms of jury
9 confusion.

10 It also goes to both intent, as Mr. Blais
11 appropriately noted, but also foreseeability. The jury has to
12 understand, and I think it's fair for us to argue, your Honor,
13 that it's not foreseeable in this context that down the line of
14 an extended chain of causation, you've got actors --
15 potentially bad actors, potentially not -- who are acting
16 contrary to the law, which by the way is appropriately and
17 accurately memorialized in the very letter that Mr. Hirst sent
18 and in the letter that he received from Mr. Feiner. So I think
19 on the jury confusion point, on intent and on foreseeability
20 it's important that the jury get an instruction.

21 THE COURT: One moment, please.

22 (Pause)

23 THE COURT: I'm going to propose that on page 64,
24 after the conscious avoidance charge, that I would have a
25 charge on Regulation S. And the lead-in would be, "During the

1 course of this trial, evidence was offered about a regulation
2 of the Securities and Exchange Commission known as Regulation
3 S. I will now instruct you on the meaning of this regulation."
4 Then following the text on page 1 of the letter of September
5 23, 2016 of Sher Tremonte. And then following that text, "this
6 instruction was given because it may help in your understanding
7 of the evidence," and leave it at that.

8 MR. TREMONTE: That's good with the defense, your
9 Honor.

10 MR. BLAIS: Judge, we believe there needs to be some
11 concept in there that this is not an element that they are
12 required to find one way or the other.

13 THE COURT: That's why I said it the way I said it.
14 That's why I said it that way. That it's given so you can
15 understand the evidence. It's being separated from the
16 charges, it's coming after the conscious avoidance and before
17 venue.

18 MR. BLAIS: Right. But conscious avoidance is a way
19 of finding an element. Venue is also something that must be
20 found by the jury.

21 THE COURT: I'm openminded on this. I can put it on
22 66 before concluding judges.

23 MS. MERMELSTEIN: I think, your Honor, what we're
24 suggesting is just one additional line that says something
25 like, "To be clear, whether or not Regulation S was violated is

1 not an element of any crime charged here, it's being provided
2 to assist you in considering the evidence in this case."

3 MR. TREMONTE: To the point made earlier, Judge, by
4 that reasoning, that qualifying language would make its way
5 into any number of paragraphs. I think the proposed placement
6 by the Court makes it clear.

7 THE COURT: Yes. I'm going with what I proposed as
8 the intro and outro, but I'm going to do it on page 66.

9 MR. TREMONTE: Yes, your Honor.

10 THE COURT: Anything else from the defendants?

11 MR. BIALE: Nothing further, your Honor.

12 THE COURT: Anything else from the government?

13 MR. BLAIS: No, your Honor.

14 THE COURT: All right.

15 MR. BIALE: We do have one housekeeping matter that's
16 not related to the jury charges.

17 THE COURT: Go ahead.

18 MR. BIALE: Your Honor, there were two stipulations
19 that were read into evidence yesterday by the defense where we
20 took out certain defendant's exhibits that either, through
21 agreement with the government or based on your Honor's rulings,
22 did not end up coming into evidence. We have revised those
23 stipulations, however, the stipulations have already been
24 offered and admitted as defendant's exhibits. So the problem
25 that we're having now is we need to sign a new version with the

1 government that has the revised defendant's exhibits, but it
2 will have a different date if we execute it today. So I guess
3 what we were actually proposing to do is backdate it to --

4 THE COURT: I'm going to make a suggestion. Don't put
5 a date on it. Do you have it done already?

6 MR. BIALE: We have it done but not signed.

7 THE COURT: Okay.

8 MR. BIALE: Not dated.

9 THE COURT: Is it dated or --

10 MR. BIALE: It is not.

11 THE COURT: What you can do, if Mr. Blais has no
12 objection, just put on the exhibit -- put after the exhibit
13 number "R". The letter "R". Okay? I would suggest you put S
14 slashes on the signatures lines and not complete the date.

15 Is that acceptable to the government?

16 MR. BLAIS: That's fine with us, your Honor.

17 THE COURT: Is that acceptable to the defendant?

18 MR. BIALE: Yes, your Honor. Thank you.

19 THE COURT: The thing you need to do is call this to
20 my attention when my deputy is here so we can make sure that
21 the prior version is stricken from the record. All right?

22 MR. BIALE: Okay.

23 THE COURT: And that's exhibit number?

24 MR. BIALE: It's Defendant's Exhibits 1300 and 1302.

25 THE COURT: Okay. Go ahead.

1 MS. MERMELSTEIN: We have a slightly similar issue.

2 THE COURT: No. Before that, so 1300 and 1302 are
3 stricken from the record and 1300R and 1302R are admitted in
4 their place instead.

5 (Defendant's Exhibits 1300R and 1302R received in
6 evidence)

7 THE COURT: I'll tell you right now, you may as well
8 know, and you may as well get your team working on it, that
9 when you're dog tired after closing arguments and suffering
10 through the jury instructions, I'm going to make you both work
11 together on assembling the trial exhibits that go into the jury
12 room. So have your own exhibits done ahead of time, you're
13 going to look at each other's stacks, make sure it's accurate
14 and complete, and then they're going to go into the jury room.
15 And I prefer not to have any delay on that.

16 MR. BLAIS: We've done that already, your Honor.

17 THE COURT: All right.

18 MS. MERMELSTEIN: In fact, your Honor, it is in doing
19 that that we discovered that we essentially have the same
20 problem with one of our stipulations, which is 1514. It has a
21 typographical error, so it suggests that Government's
22 Exhibit 1033 is stipulated to and then was offered as part of
23 the stipulation. That's one of the documents that, in fact,
24 the parties agreed not to offer, and so we'd like to strike
25 Government's Exhibit 1033 from the record and then substitute

1 in the same method that the defense will do, 1514R for the
2 current 1514.

3 THE COURT: Any objection?

4 MR. BIALE: No objection, your Honor.

5 THE COURT: Excellent.

6 (Government's Exhibit 1514R received in evidence)

7 MR. BLAIS: I know we had some discussion at the end
8 of the trial day, I believe on Wednesday, regarding the timing
9 or length of the jury addresses. I think that's a topic we'd
10 like to revisit.

11 We've kind of thought about the length of time that
12 may be necessary. We do think that this is a case -- although
13 it's been a relatively short trial, it is a trial with some
14 degree of complexity and certainly a lot of documents, and we
15 actually think that fulsome jury addresses may actually help
16 along the jury deliberations in this case and help the jury
17 understand the evidence.

18 I think from our perspective, I know I said 90 minutes
19 for my estimate of the closing. I think, to be safe, I would
20 say two hours for --

21 THE COURT: I think you guys -- and I've seen this --
22 guys and gals -- I've seen this in trials. There's a
23 fundamental misunderstanding of juror comprehension. And if
24 you think that a jury is going to follow your summation for two
25 and a half hours, or two hours, or the defense's summation for

1 that length, it's a dubious proposition, and I would urge you
2 to check with those who make a profession of this, jury
3 research consultants, many of whom have Ph.D.s in the sciences,
4 in psychology. You will have lost your audience. I could give
5 you four hours if you want, but you're going to lose them. You
6 will have lost them when you get up to that level.

7 MR. BLAIS: Judge, we, of course, are going to make
8 every effort to streamline and be as comprehensive but as short
9 as necessary to fully explain the evidence, we just want to
10 ensure that we are able to fully explain the case, which, as we
11 said, has some degree of complexity. There are a lot of moving
12 parts to this particular scheme, and tying all of the various
13 pieces of evidence that came in during the course of this
14 trial, and there are many, tying them altogether I think takes
15 some time to fully present to the jury.

16 THE COURT: What were you asking for in terms of a
17 rebuttal summation?

18 MR. BLAIS: I think we intended to ask for two hours
19 for the principal closing and 45 minutes for rebuttal.

20 THE COURT: So you want to elongate this for 45
21 minutes.

22 Mr. Tremonte what would you like?

23 MR. TREMONTE: I would like for there not to be a
24 45-minute rebuttal.

25 THE COURT: What else would you like?

1 MR. TREMONTE: Your Honor, when asked the other day, I
2 said 90 minutes. I have been working on this and thinking
3 about it. I tend to agree -- I'm sorry, I said two hours, your
4 Honor. I tend to agree with the Court. I think to go one
5 minute more than is absolutely necessary is a mistake. That
6 said, my original request stands, but I fully intend to be
7 better than two hours. I'd like to do better than 90 minutes
8 because I tend to agree with the Court that we run a really
9 high risk of losing the jury, which in this case we absolutely
10 don't want to do.

11 THE COURT: Plus which, I should say for the record
12 that the jury instructions will run for close to three hours.

13 MR. TREMONTE: Understood, your Honor.

14 THE COURT: So that's asking the jury to comprehend
15 745 minutes of dense material. It means the jury won't get
16 this case. We're not sitting next Friday, we're bumping into
17 the Jewish holidays, and I think it's a mistake.

18 For one thing, the record will show that, yes, this is
19 a case that warrants -- it was an eight-day trial. It warrants
20 more than a 45-minute overview of the evidence from each side.
21 I fully get that. But let me see what I can come up with.

22 So the government will have 90 minutes on its opening
23 assumption, the defense will have 110 minutes on its, and the
24 government will have 30 minutes on its rebuttal.

25 MR. BLAIS: Understood, your Honor.

1 THE COURT: Anything else?

2 MR. BLAIS: Nothing from the government.

3 THE COURT: Anything else from the defendant?

4 MR. TREMONTE: No. Thank you, your Honor.

5 MS. HARRIS: Sorry. Administratively, I note we did
6 provide your Honor with a copy of the binder. I see it right
7 there. Thank you very much.

8 Then also, I just note that we will remind your deputy
9 on Monday, because she asked me to, but as you may recall, we
10 marked and offered one of the emails in the binder in the
11 middle of the read. The jury's copies of the binders are not
12 marked, so we prepared 18 copies of the replacement page, which
13 we can just hand to the jury, to the extent they need a marked
14 exhibit.

15 THE COURT: Should I be doing anything?

16 MS. HARRIS: No, that's fine, Judge.

17 THE COURT: Thank you very much.

18 It almost could sound sarcastic saying have a pleasant
19 weekend, but you have families and lives as well, I expect
20 you're going to be working hard, but I hope you also get some
21 rest and some personal time. I know it's stressful, and I may
22 say this again, but it's rare that I can say that it's a
23 pleasure to have such fine lawyers on both sides before me on a
24 case. I'm able to say that here, and I'm able to say that with
25 honesty and sincerity.

1 I apologize if I'm repeating something I've said, but
2 I have all different types of lawyers appearing in this court,
3 and when you have good lawyers, there may be more issues that
4 arise, but they are presented honestly and efficiently, and
5 every judge I ever talk to agrees with the proposition they'll
6 take tough, aggressive, good lawyers any day of the week over
7 folks who really don't know what they're doing at times and
8 create a lot of unnecessary work and worry for the Court.

9 So it's really been a delight to have all six of the
10 presenting lawyers and their staffs. Thank you.

11 (Adjourned to September 26th, 2016, at 10:00 a.m.)
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